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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 228

JOHN T. WILLINGHAM AND C. A. JARVIS, PETITIONERS

v.

DANIEL MORGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (A. 66–70) is reported at 383 F. 2d 139. The opinions of the district court (A. 40–44, 51–61) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1967. A timely petition for rehearing was denied on March 11, 1968. On June 10, 1968, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including June 24, 1968 (A. 71). The petition was filed on that date, and was granted on December 9, 1968 (A. 72). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under 28 U.S.C. 1442(a)(1), which authorizes the removal to a federal court of civil actions brought against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *," the warden and chief medical officer of a federal penitentiary are entitled to remove an action brought in a State court by a federal prisoner based upon torts allegedly committed within the prison walls.

2. Whether the court of appeals erred in holding that the "color of office" test under the removal statute is "much narrower" than the standard of "official immunity" of government officials from suit as delineated in *Barr* v. *Matteo*, 360 U.S. 564.

STATUTE INVOLVED

28 U.S.C. 1442 provides, in pertinent part:

> Federal officers sued or prosecuted.
>
> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
>
> * * * * *
>
> (3) Any officer of the courts of the United

States, for any Act under color of office or in the performance of his duties * * *.

STATEMENT

Daniel Morgan, a prisoner in the United States Penitentiary at Leavenworth, Kansas,[1] brought a tort action in a Kansas State court against John T. Willingham, the prison warden, and C. A. Jarvis, its chief medical officer, and 75 unidentified co-defendants.[2] The complaint alleged, primarily, that defendants (petitioners here) had twice caused plaintiff (respondent here) to be inoculated with a "deleterious foreign substance, serum or drug," resulting in various injuries, and also did "assault, batter, club, choke, and torture the plaintiff," causing him serious injury (A. 12, 14). Respondent sought $2,200,000 damages from petitioner Willingham, and $1,065,000 damages from petitioner Jarvis (A. 15).

The case was removed to the United States District Court for the District of Kansas, upon petitioners' verified petition for removal under 28 U.S.C. 1442(a)(1). The petition stated that, at all times relevant to the complaint, Willingham was the warden of the United States Penitentiary at Leavenworth

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[1] Morgan is no longer incarcerated; he was released on May 9, 1968, and presently resides in Washington, D.C..

[2] The complaint named as additional defendants "The First Doe Corporation, The Second Doe Corporation, the Roe Company and Doe numbers 1 through 72." (A. 11). No additional defendants were ever identified, however, and the complaint was simply dismissed as to the named defendants Willingham and Jarvis by the district court (A. 61). Respondent sought a total of more than $93 million in damages from all defendants (A. 66).

(A. 6), Jarvis was an employee of the United States Public Health Service assigned to that penitentiary (*ibid.*), and Morgan was a duly committed prisoner or inmate at the penitentiary (A. 9). The petition also stated (*ibid*):

> That any act or thing that these petitioners, or either of them may have done or authorized to be done concerning the plaintiff as alleged and complained of by plaintiff in his said complaint or petition, was done and made by them in the course of their duties as officers of the United States of America and as persons acting under officers of the United States of America and under color of such offices and by virtue thereof; namely, as warden of the United States Penitentiary at Leavenworth, Kansas and as an employee of the United States Public Health Service assigned to the United States Penitentiary at Leavenworth, Kansas, respectively; and that the acts complained of were made solely under color of their respective offices and within the scope of their authority.

Respondent moved to remand the action to the State court, asserting that petitioners "were not employed nor were they under any obligation or duty to the United States to commit any of the several torts alleged," and that the commission of such torts was "a frolic of their own which had no relevancy to their official duties" (A. 31).[3]

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[3] In opposing the petition for a writ of certiorari, respondent pointed out that certain interrogatories he had filed in the Kansas State court prior to removal were not answered by petitioner Willingham, and contended that this justified the court of appeals' requiring additional factual hearings on the

Petitioners moved for summary judgment, on the ground that, as federal officers engaged in their official duties when the alleged tortious acts were committed, they were immune from respondent's suit. Willingham's affidavit set forth in detail his official duties as warden, and stated that his only contact with respondent had been inside the walls of the Leavenworth Penitentiary in performance of those duties (A. 44–46). Jarvis's affidavit (A. 47–48) similarly described his duties as chief medical officer at the penitentiary, and stated that the only contact he had with respondent "has been at the prison hospital" in performance of his duties as chief medical officer, "and only with regard to medical care and treatment, diagnoses and routine physical examination" (A. 48).

The district court denied respondent's motion to remand (A. 44), concluding that the case had properly been removed under 28 U.S.C. 1442(a)(1) (A. 42–43). Subsequently, the district court granted petitioners' motion for summary judgment and dis-

issue of removability. However, the only mention made by respondent in his motion to remand concerning those interrogatories related not to whether petitioners had acted under color of office, but asserted that "these removing defendants have dealt with and know the identity or true names of each and all of the persons referred to as their co-defendants * * *," and that "the plaintiff has sought by interrogatories, duly propounded to the defendant Willingham, to learn the true identity of the several Doe defendants herein so that he may amend the Complaint 'to include therein such persons' true name or identity whenever the same is discovered.' (See Complaint, page 2.) To date, the defendant Willingham has not seen fit to answer any of the said interrogatories" (A. 32).

missed the complaint (A. 61). Relying upon the uncontradicted affidavits of Willingham and Jarvis, the court ruled that they were immune from the suit under the doctrine of *Barr* v. *Matteo,* 360 U.S. 564 (A. 56–60).

On appeal, the issue whether the case was properly removed was not briefed before the court of appeals (until the filing of a petition for rehearing, after the decision below was rendered). Rather, respondent took the position that the assertions in petitioners' petition for removal to the federal district court (A. 6–10) did not constitute a sufficient basis for immunity from suit and that summary judgment on that ground had accordingly been improperly granted (A. 48–50). Thus, the case was submitted to the court of appeals on briefs dealing with various issues relating to the correctness of the district court's granting of summary judgment under the doctrine of *Barr* v. *Matteo.*[4]

The court of appeals reversed, however, without reaching the immunity issue and thus without expressly deciding whether the district court had correctly held that petitioners were immune from suit. Instead, that court ruled that the "color of office" test for removal of State court suits by federal officers

[4] In support of his contention that summary judgment on the immunity issue was improper, respondent urged, *inter alia*, that there were genuine issues of material fact relating to the immunity defense, that his interrogatories should have been answered before summary judgment was granted, and that petitioners allegedly had "waived" the immunity defense by their answer filed in the Kansas State court prior to removal (A. 48–50).

under 28 U.S.C. 1442(a)(1) is "much narrower" than the "official immunity" standard of *Barr* v. *Matteo* (A. 70). The court further stated that while the record "may have adequately supported the finding of immunity," it did not sufficiently establish that the alleged acts were committed under "color of office" (A. 69). It therefore remanded the case to the district court "for a factual determination of this issue" (A. 70). A petition for rehearing was denied without opinion (*ibid*).

SUMMARY OF ARGUMENT

The court of appeals held that the "color of office" test for removal is significantly narrower than the standard for determining a federal officer's immunity from suit, and that a factual hearing is necessary before deciding whether federal prison officials are acting under color of office in allegedly committing torts against a prisoner. The correct rule, however, should be precisely the contrary; even an officer who goes beyond the "outer perimeter of [his] line of duty" (*Barr* v. *Matteo,* 360 U.S. at 575) may nevertheless be acting under a claim or color of his office (cf. *United States* v. *Classic,* 313 U.S. 299, 326; *Screws* v. *United States,* 325 U.S. 91; *Williams* v. *United States,* 341 U.S. 97). Accordingly, the decision below, which conflicts with decisions of at least three, and arguably several more, courts of appeals, stands the law on its head, and is inconsistent with the plain language of 28 U.S.C. 1442(a)(1).

In addition to nullifying the express "color of office" language of the removal statute, the decision

below clashes with the purposes of *both* the removal statute and the "official immunity" doctrine.

Provisions for the removal of certain actions from State to federal courts date back to the Federal Judiciary Act of 1789 (see *Tennessee* v. *Davis*, 100 U.S. 257, 267), and specifically as to suits against federal officers, to 1815 (*ibid.*). The removal statute here involved is designed to ensure that a federal officer "shall not be forced to answer for conduct assertedly within his duties in any but a Federal forum" (*North Carolina* v. *Carr*, 386 F. 2d 129, 131 (C.A. 4); see *Poss* v. *Lieberman*, 299 F. 2d 358, 359 (C.A. 2), certiorari denied, 370 U.S. 944). Congress has successively expanded its scope to the point where, in its present form, it covers both criminal and civil actions against all federal officers. As discussed at length in various opinions of this Court, the underlying congressional purpose has been to protect against the litigation of suits against federal officers in a potentially parochial and unfavorable forum, not only for the sake of the individuals involved but as a reflection of the national government's interest in the proper resolution of such suits.

The principal rationale of the "official immunity" doctrine, as explained in *Barr* v. *Matteo*, is as follows (360 U.S. at 571):

> * * * [O]fficials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would other-

> wise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

To require extensive factual hearings on the threshold issue of removal would entail the unnecessary expenditure of time and energies and would necessarily inhibit governmental officials in carrying out their duties no less than if they were compelled to defend against groundless suits on the merits. Yet that is the consequence of the decision below.

ARGUMENT

THE "COLOR OF OFFICE" TEST FOR REMOVAL OF STATE COURT SUITS BY FEDERAL OFFICERS UNDER 28 U.S.C. 1442(a)(1) IS BROADER, NOT NARROWER, THAN THE STANDARD FOR THEIR IMMUNITY FROM SUIT UNDER BARR V. MATTEO, 360 U.S. 564; ALLEGED TORTS COMMITTED BY FEDERAL PRISON OFFICIALS AGAINST A FEDERAL PRISONER WITHIN THE WALLS OF A UNITED STATES PENITENTIARY ARE ACTIONS TAKEN UNDER COLOR OF THEIR OFFICES

I. THE HOLDING BELOW IS CONTRARY TO THE PLAIN LANGUAGE OF THE REMOVAL STATUTE

The particular provision of the federal removal statutes involved in the instant case, 28 U.S.C. 1442(a)(1), broadly authorizes the removal to federal district courts of any civil action or criminal prosecution brought in a State court against officers of the United States, or persons acting under them, "for any

act under color of such office."[5] Petitioners are both senior prison officials. The tortious acts they allegedly committed concededly took place within the prison where respondent was incarcerated. Giving the words of Section 1442(a)(1) their normal meaning, such acts were committed under "color of office."

Any action by a federal official within the "outer perimeter" of the line of duties of his office that is immune from suit under *Barr* v. *Matteo* would necessarily seem at least under "color" of the same office. Indeed, even actions beyond the outer perimeter of an official's duties might nonetheless be taken under a claim or "color" of his office. Cf. *United States* v. *Classic*, 313 U.S. 299, 326, where it is pointed out that even, "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of' state law." Accord, *Screws* v. *United States*, 325 U.S. 91; *Williams* v. *United States*,

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[5] The petition for removal relied only upon 28 U.S.C. 1442(a)(1); however, in the court of appeals, the petition for rehearing on behalf of Willingham and Jarvis (the only occasion below where petitioners dealt with the removal question, see *supra*, p. 6) also defended the district court's refusal to remand on the basis of 28 U.S.C. 1442(a)(3), since petitioners, as penal officers, are officers of the courts. See *Brann* v. *McBurnett*, 29 F. Supp. 188 (E.D. Ark.); *Jones* v. *McGill*, 46 F. 2d 334 (D. N.H.); *Horne* v. *Aderhold*, 1 F. Supp. 690 (N.D. Ga.). The broad sweep of Section 1442(a)(3) was expressly recognized by the court of appeals. In citing that provision, the court below noted that "[a]n officer of the federal court may remove an action against him if the act was 'under color of office or in the performance of his duties'" (A. 68). Yet the court did not consider its possible application here

341 U.S. 97; *Monroe* v. *Pape*, 365 U.S. 167.[6] By parity of reasoning, any actions allegedly taken by federal prison officials respecting a federal prisoner within the walls of a United States prison wholly on federal property are "made possible only because the [alleged] wrongdoer is clothed with the authority of [federal] law" (*United States* v. *Classic*, 313 U.S. at 326).

Contrary to the holding below (A. 67), removability is not defeated by allegations of the wrongful or negligent character of the alleged actions. See *Blitz* v. *Boog*, 328 F. 2d 596 (C.A. 2), certiorari denied, 379 U.S. 855; *Perez* v. *Rhiddlehoover*, 247 F. Supp. 65, 71

[6] In *Screws* v. *United States*, 325 U.S. 91, 111–112, this Court noted that the "color of office" test for removal may be somewhat narrower than the "color of law" standard under congressional civil rights legislation, so as to ensure that removal does not "deprive state courts of their authority to enforce their own laws." Even though the removal statute here involved may be somewhat narrower in this regard, that is hardly enough to sustain the holding below. In the first place, there is no danger of deprivation of any conceivable State interest in the removal of a case involving alleged torts by federal prison officials against a federal prisoner within the walls of a federal prison located on United States property (see *Hayes* v. *United States*, 367 F. 2d 216, 218–220 (C.A. 10)). In any event, the "strict construction" argument does not justify the Tenth Circuit's view that the test for removability is narrower than the standard for immunity. If a federal official is immune from suit under *Barr* v. *Matteo*, any interest the State might have had which could be raised as an objection to removal plainly is overridden by the federal government's interest, which the immunity doctrine reflects, and the State could not properly proceed against him in *any* court. *North Carolina* v. *Carr*, 386 F. 2d 129 (C.A. 4). Moreover, there is no proper State interest in having the *Barr* v. *Matteo* issue—which is solely a matter of federal law (*Howard* v. *Lyons*, 360 U.S. 593, 597)—litigated in a State court.

(E.D. La.); cf. *Maryland* v. *Soper*, 270 U.S. 9, 33.[7] If it did, no such case would be removable, since an essential claim in such suits always is that the federal officers have acted improperly (see note 12, *infra*). Rather, as pointed out in *Allman* v. *Hanley*, 302 F. 2d 559, 562 (C.A. 5), such a suit may be removed upon "the allegation that petitioners were officers acting under color of office in the employment of the United States * * *." This standard reflects the plain language of Section 1442(a)(1); nothing therein even arguably suggests the conduct of the detailed factual inquiry which the decision below would require as a predicate for removal (see A. 69–70).

II. THE HOLDING BELOW IS INCONSISTENT WITH THE CONGRESSIONAL INTENT IN ENACTING AND SUCCESSIVELY EXPANDING THE SCOPE OF THE REMOVAL STATUTE

The purpose of 28 U.S.C. 1442(a)(1), as long recognized by this Court (see *infra*, pp. 13–17), was recently restated by the Court of Appeals for the Fourth Circuit in *North Carolina* v. *Carr*, 386 F. 2d 129, 131, as

[7] The court of appeals relied upon a district court case, *Brenner* v. *Kelly*, 201 F. Supp. 871 (D. Minn.), for the proposition that actions based upon allegations of "negligent" or "wrongful" acts of federal officers are not removable (A. 69). In our view, that case, and the other district court cases cited by the court of appeals, were wrongly decided and reached a result contrary to all previous and subsequent appellate court decisions. *E.g.*, *Blitz* v. *Boog*, *supra*; *Poss* v. *Lieberman*, 299 F. 2d 358 (C.A. 2), certiorari denied, 370 U.S. 944; *North Carolina* v. *Carr*, 386 F. 2d 129 (C.A. 4); *DeBusk* v. *Harvin*, 212 F. 2d 143 (C.A. 5); *Preble* v. *Johnson*, 275 F. 2d 275 (C.A. 10); *Allman* v. *Hanley*, 302 F. 2d 559 (C.A. 5). In any event, those decisions are plainly distinguishable from the situation here presented (see *infra*, p. 22).

> * * * to take from the State courts the indefeasible power to hold an officer or agent of the United States criminally or civilly liable for an act allegedly performed in the execution of any of the powers or responsibilities of the Federal sovereign. Neither immunity nor impunity is guaranteed the alleged offender; the statute merely transfers his trial to the Federal courts. Insistence upon the right of removal has been declared essential to the integrity and preeminence of the Federal government within its realm of authority. The reasons for the statute are so apparent, and were so carefully expounded, with its history carefully treated, in State of Tennessee v. Davis, 100 U.S. 257, 262 * * * (1879), that we have no occasion to reiterate here the necessity for its rigid enforcement.

In a similar vein, the Second Circuit pointed out *Poss* v. *Lieberman*, 299 F. 2d 358, 359, certiorari denied, 370 U.S. 944:

> Where a federal officer asserts a privilege for acts done under color of his office the defense is based upon a federal right, the purpose of which is to prevent federal employees from being unduly harassed by "vindictive or ill founded damage suits brought on account of action taken in the exercise of their official responsibilities" * * *. Consequently, the federal government has a special interest in such matters which justifies the granting of removal jurisdiction to the federal courts in such cases. * * *

See also *Allman* v. *Hanley*, 302 F. 2d 559, 562 (C.A. 5); *DeBusk* v. *Harvin*, 212 F. 2d 143, 146 (C.A. 5).

Removal to federal courts of suits brought in State

courts has been an aspect of our jurisprudence since the inception of the federal system. The Federal Judiciary Act of 1789 itself provided for removal of civil actions to federal courts in certain situations (Act of Sept. 24, 1789, ch. 20, sec. 12, 1 Stat. 79). See *Tennessee* v. *Davis,* 100 U.S. 257, 267. Provisions for the removal of State court actions brought against certain categories of federal officers are similarly of considerable antiquity. As recently noted by this Court in *Greenwood* v. *Peacock,* 384 U.S. 808, 821, n. 17, "Long before 1866, federal statutes had guaranteed certain federal revenue officers the right to remove to the federal court state court proceedings instituted against them because of their official actions." Earlier opinions of this Court have traced the development of the removal concept and have discussed the reasons underlying these statutory provisions. *E.g., Tennessee* v. *Davis,* 100 U.S. at 262–269; *Gay* v. *Ruff,* 292 U.S. 25, 32–34.

As noted in *Peacock, supra,* the Customs Act of 1815 was "the primordial officer removal statute" (384 U.S. at 821, n. 17). That statute (Act of Feb. 4, 1815, ch. 31, sec. 8, 3 Stat. 198) provided for the removal to a federal court of both civil and criminal suits against federal officers engaged in enforcing the customs laws, or acting "under colour thereof" (*ibid.*).[8] Subsequently, in the so-called Force Act of 1833, the scope of removal was broadened to include suits against federal officers and other persons "for

[8] See also Act of March 3, 1815, ch. 94, sec. 6, 3 Stat. 233, which contained virtually identical provisions regarding removal. The *Peacock* case, it should be noted, involved a companion provision to Section 1442—28 U.S.C. 1443—which provides for removal of certain civil rights litigation and dates back to 1866.

or on account of any act done under the revenue laws of the United States, or under colour thereof" (Act of March 2, 1833, ch. 57, sec. 3, 4 Stat. 633). As pointed out in *Davis, supra* (100 U.S. at 268–269), the provisions of that statute were carried forward in similar legislation enacted in 1866, which in turn was reenacted as Section 643 of the Revised Statutes, the provision involved in that case. Though subsequently reenacted, little actual change occurred in the statute until 1948. "Prior to 1948 the federal officer removal statute * * * was limited to revenue officers engaged in the enforcement of the criminal or revenue laws * * *," but "was expanded in 1948 to encompass all federal officers" (*Peacock, supra,* 384 U.S. at 820, n. 17). Thus, the removal statute here involved has been successively extended in scope to the point where, in its present form, it covers all federal officers acting under a claim or color of their office. See, *e.g.,* H. Rep. No. 308, 80th Cong., 1st Sess., p. A134 (1947).

Throughout the removal statute's history, its basic purpose has been viewed as protecting the interests of the national government by shielding its agents from vexatious litigation regarding their official duties in a forum potentially more subject to local influence than a federal court. Thus, the removal concept is actually an incident of federal supremacy.[9]

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[9] For a general discussion of the background and present application of the provisions governing removal of suits against federal officers (28 U.S.C. 1442), see 1A Moore, *Federal Practice* ¶0.164, pp. 821–839 (1965). Moore points out that Section 1442 creates "a jurisdictional right of removal quite apart from the

Indeed, the congressional intent in establishing and expanding this concept has appeared so manifest that most courts have found it generally unnecessary to discuss the underlying premises upon which removal is grounded. This Court has frequently proceeded in this fashion, while noting in passing that the removal statute should be construed to give full effect to the purpose for which it was enacted. See, *e.g.*, *Venable* v. *Richards*, 105 U.S. 636, 638; *Maryland* v. *Soper*, 270 U.S. 9, 33; *Colorado* v. *Symes*, 286 U.S. 510, 517.

Perhaps the best summary of the underlying intent of Congress is given in *Tennessee* v. *Davis*, 100 U.S. at 263, where the Court stated that the federal government

> * * * can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred

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general removal statute" (28 U.S.C. 1441), and, unlike that section, requires no separate basis of federal court jurisdiction (*id.* at 825, 837–838) (see A. 42).

> by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.[10]

In light of the removal statute's background, it seems clear that Congress intended it to be read in a generous, not a grudging, manner. To suggest, as did the court below (A. 70), that the "color of office" test is narrower than the "official immunity" standard of *Barr* v. *Matteo* because statutory construction is involved in the former situation and a court-fashioned rule in the latter is consistent neither with the history of the statute nor sound judicial analysis. Here the Tenth Circuit simply failed to give adequate effect to the manifest purpose of the removal statute.

It follows from the essential thrust of the removal statute that *at least* those officials who are acting within the outer perimeter of their official duties are plainly entitled—as is the federal government itself [11]

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[10] Cf. *In re Neagle*, 135 U.S. 1, 61–62.

[11] It was pointed out in *Barr* v. *Matteo* (360 U.S. at 571), that the government, not just the individual officer, has a vital stake in the avoidance of suits in respect of acts done in the course of official duties. See also *Mayor* v. *Cooper*, 6 Wall. 247, 253; *Tennessee* v. *Davis*, 100 U.S. at 262; *Bradford* v. *Harding*, 284 F. 2d 307, 309 (C.A. 2) (see *supra*, p. 15).

to be protected against having a matter in controversy litigated in a potentially prejudiced or hostile State forum. In fact, one of the purposes of Section 1442 is to make it unnecessary to prove any actual prejudice or hostility. Indeed, to give the congressional intent underlying 28 U.S.C. 1442(a)(1) appropriate effect, every federal officer who has even an arguable claim that he was acting pursuant to his official duties at the time in question (hence, under "color of office") should be able to remove the case to federal court. Only in this manner can it be assured that the interests Congress sought to protect in enacting and expanding the statute will be adequately served. At all events, for the reasons stated earlier (*supra*, p. 10), it is unnecessary to go that far here in order to find that removal was proper. Whatever may be the ultimate limits of the removal statute, petitioners plainly were acting under "color of office" when they committed—if they did at all—the alleged acts on which respondent grounded his suit.

III. THE HOLDING BELOW TENDS TO UNDERMINE THE "OFFICIAL IMMUNITY" DOCTRINE OF BARR V. MATTEO, 360 U.S. 564

There is an obvious interplay between the "color of office" test of 28 U.S.C. 1442(a)(1) and the "official immunity" standard of *Barr* v. *Matteo* in suits brought against federal officers in State courts for torts allegedly committed in connection with the performance of their official duties. Indeed, the central issue in the instant case involves the nature of that interplay. Of course the concepts are not subject to precise or

quantitative definition. "Color of office" may mean different things to different persons, and may be construed somewhat differently depending on the context in which the phrase is used. Similarly, it is not always easy to describe with exactitude the area encompassed within "the outer perimeter of [an officer's] line of duty" (360 U.S. at 575), or what constitutes "action in the line of duty" by a public official (*ibid.*). But there is no necessity here to attempt to give precise definition to these terms. Rather, the problem here simply involves the comparative reach of the two concepts, relative to each other. Whatever the ultimate scope of each, the test for removal is necessarily broader than the standard for immunity. Accordingly, the court of appeals' restrictive interpretation of the "color of office" test must be rejected.

In *Barr* v. *Matteo* the considerations underlying the doctrine of official immunity were succinctly explained (360 U.S. at 571):

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.[12] * * *

[12] See also *Howard* v. *Lyons*, 360 U.S. 593 (decided along with *Barr* v. *Matteo*); *Spalding* v. *Vilas*, 161 U.S. 483; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949 (quoted from at length in *Barr* v. *Matteo*, 360 U.S at 571–572); *Norton* v. *McShane*, 332 F. 2d 855 (C.A. 5), certiorari denied, 380 U.S. 981.

Here the Tenth Circuit held that the "color of office" test for purposes of removal is "much narrower" than the immunity standard, and that an extensive factual hearing, not required for determining whether the officer acted within the outer perimeter of his duties, is necessary in determining removability. That holding effectively juxtaposes the two concepts, and thus poses a real danger of defeating, to a considerable extent, the purposes underlying the *Barr* v. *Matteo* doctrine.

Under the decision below, federal officers asserting their right to remove a suit brought against them in a State court may be subjected to the very sort of oppressive litigation from which the immunity doctrine is designed to protect them in order to effectuate that right.[12] Even an officer who goes beyond the outer perimeter of his assigned duties may nevertheless be acting under a claim or "color" of his office. Yet the court below, while noting that the undisputed evidence "may have adequately supported the finding of immunity," concluded that it was nonetheless "insufficient to support" a determination that the alleged acts were performed under color of office for removal purposes (A. 69). This, quite literally, stands the law on its head.

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[12] It was further explained in *Barr* v. *Matteo* that "[t]he fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, *despite the allegations of malice in the complaint* * * *" (360 U.S. at 575; emphasis added). Thus, the fact that respondent asserted that petitioners here acted maliciously is insufficient to render the immunity defense, much less the "color of office" test for removal, inapplicable. In fact, such an allegation can almost invariably be expected in a complaint of this kind (see *supra*, p. 12).

By requiring the application of a more stringent "factual" test for removal than for dismissal of a suit under *Barr* v. *Matteo*, the holding below threatens to undermine the purposes of the "official immunity" doctrine in a significant class of cases—those brought against federal officers in State courts. The result, quite predictably, will be to foster just the sort of harassing and time-consuming litigation from which the immunity doctrine seeks to insulate federal officers. Moreover, in enacting 28 U.S.C. 1442(a)(1), Congress could hardly have intended that a federal district court would be required not only to reach the merits of the immunity defense but to go further and apply a higher standard in deciding whether the suit was within its jurisdiction as having been properly removed. Yet that result flows logically from the decision below. And, as a concomitant to that aspect of that holding, should a district court conclude that, applying the Tenth Circuit's approach, a particular suit was not removable—albeit probably subject to dismissal under *Barr* v. *Matteo*—it would nonetheless be required to remand to the State court for its assessment of the immunity defense and, at least possibly, for trial (see A. 70). All this of course would result in a serious impairment of the protection heretofore thought afforded by the immunity doctrine, as well as depriving federal officers of the federal forum that Congress prescribed for such litigation.

Instead, the correct approach is just the opposite of that employed here by the Tenth Circuit. The "color of office" test for removal should be viewed as broader, not narrower, than the "official immunity" standard, so that at least some cases removed

to a federal court might actually be tried there, with the immunity defense having been rejected as inapplicable. Otherwise, the removal statute becomes an empty shell. Under the approach of the court below, if a case is removable it is perforce subject to dismissal under *Barr* v. *Matteo*. But Congress certainly did not provide a federal forum for such litigation if those courts would be limited either to dismissing the case or remanding it to the State courts.

Of course, often a removed case is subject to dismissal under *Barr* v. *Matteo*, as the district court here concluded (A. 61; see also *Poss* v. *Lieberman*, 299 F. 2d at 360–361, and generally the cases cited in note 15, *infra*). But that simply reflects the fact that many such suits are encompassed within both the "color of office" test and the "official immunity" standard. What Congress obviously contemplated by enacting and enlarging the scope of Section 1442 was that most suits brought against federal officers would be removable to a forum perhaps less parochial in outlook, less subject to local pressures. Only when the action complained of had no conceivable connection with the officer's governmental duties, or there was no causal relationship between those duties and the conduct at issue, would removal even arguably be improper.

Contrary to the view of the court below, the "color of office" test should not be viewed as providing only "a rather limited basis for removal" (A. 68). Nor, "[t]o be eligible for removal," should the officer be required to "exclude the possibility that the suit is based on acts or conduct not justified by his federal

duty" (A. 69). Placing that substantial a burden on federal officers would result in few removals and, in all likelihood, in extensive litigation about the threshold issue of removal which would, in turn, tend to defeat the purpose of the "official immunity" doctrine to protect those officers from such burdens.

Other courts of appeals have recognized the force of these arguments, and have reached results contrary to the holding below. *E.g.*, *Allman* v. *Hanley*, 302 F. 2d 559, 562 (C.A. 5) ("the allegation that petitioners were officers acting under color of office in the employment of the United States was sufficient [for the statute] requires only a short, plain statement of facts entitling a defendant to removal"); *North Carolina* v. *Carr*, 386 F. 2d 129, 131 (C.A. 4) ("the central and grave concern of the [removal] statute is that a Federal officer shall not be forced to answer for conduct assertedly within his duties in any but a Federal forum"). Indeed, in *Poss* v. *Lieberman*, 299 F. 2d at 359 (C.A. 2), the court recognized the proper relation between the removal and immunity concepts, in stating:

> * * * [R]emoval is based on a federal interest in the matter, the facts underlying which may be stated in the removal petition itself, whether or not federal jurisdiction existed over the claim as stated in the complaint as originally served. Where a federal officer asserts a privilege for acts done under color of his office the defense is based upon a federal right, the purpose of which is to prevent federal employees from being unduly harassed by "vindictive or ill founded damage suits brought

> on account of action taken in the exercise of their official responsibilities." Barr v. Matteo, 360 U.S. 564–565 * * *. Consequently, the federal government has a special interest in such matters which justifies the granting of removal jurisdiction to the federal courts in such cases. * * *[14]

See also *Rachel* v. *Georgia*, 342 F. 2d 336, 340 (C.A. 5), affirmed, 384 U.S. 780, 793.[15]

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[14] This was plainly understood by the district court here. That court stated (A. 42): "The removal in this case is based on federal interest in the matter, facts underlying which may be stated in the removal petition itself, and from which it [is] determined whether or not federal jurisdiction existed over the claim as stated in the complaint as originally filed and served."

Similarly, the district court here perceived the interrelationship between the "color of office" and "official immunity" concepts (see A. 42–43, where the court referred to *Barr* v. *Matteo* in a passage virtually identical to that quoted above from *Poss* v. *Lieberman*). Quite properly, the court pointed out that "if, upon hearing of the case, it should develop that the acts of the defendants though allegedly done by them when acting under color of their office, were not so committed, then the Court, upon a renewal of plaintiff's motion to remand, would further consider it" (A. 43).

[15] Decisions of several other circuits also implicitly reject the approach taken here by the court below. See *Sarner* v. *Mason*, 228 F. 2d 176, 178 (C.A. 3); *Meredith* v. *Van Oosterhout*, 286 F. 2d 216 (C.A. 8), certiorari denied, 365 U.S. 835; cf. *O'Campo* v. *Hardisty*, 262 F. 2d 621, 624 (C.A. 9); *Murphy* v. *Kodz*, 351 F. 2d 163, 165 (C.A. 9); *Preble* v. *Johnson*, 275 F. 2d 275 (C.A. 10). Other decisions in the Second and Fifth Circuits are in accord with the holdings in the *Allman* and *Poss* cases on this issue. *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655, 660 (C.A. 2), certiorari denied, 374 U.S. 827; *Blitz* v. *Boog*, 328 F. 2d 596, 600 (C.A. 2) certiorari denied, 379 U.S. 855; *DeBusk* v. *Harvin*, 212 F. 2d 143, 146 (C.A. 5); *State of Texas* v. *National Bank of Commerce of San Antonio*, 290 F. 2d 229, 231 (C.A. 5), certiorari denied *sub nom. Falkner*,

Here the Tenth Circuit seemed to imply that its approach could be justified on the ground that removability must be stringently tested to avert improper infringements upon the legitimate interests of the States in enforcing their laws. There can be no quarrel with the general proposition that such infringements should be avoided. But the very case relied upon by the court below in this regard (see A. 69), indicates that this consideration was misapplied here. In *Maryland* v. *Soper,* 270 U.S. 9, 33, this Court stated that

> * * * the statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts *or his presence at the place in performance of his official duty* constitute the basis, though mistaken or false, of the state prosecution [emphasis added].

Here it is undisputed that petitioners' only contacts with respondent were within the walls of Leavenworth prison. Removal of a suit by a federal prisoner against federal prison officials based upon torts allegedly committed within a federal prison located upon United States property (see *Hayes* v. *United States,* 367 F. 2d 216, 218–220), and under the exclusive control and management of the Attorney General of the United States (18 U.S.C. 4001), obviously could not encroach upon any valid interest of the State of Kansas. Nor does removal in such circumstances en-

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Banking Commissioner v. *National Bank of Commerce of San Antonio, Texas,* 368 U.S. 832. Neither the *Allman, Poss* or *Carr* case, it should be noted, was mentioned by the court of appeals.

danger the delicate balance between state and national governments which exists in our federal system—particularly since respondent was not and is not a citizen of Kansas, and was located there only because of his incarceration in a federal penal institution (see note 1, *supra*).

Indeed, the removal provisions are peculiarly applicable to suits brought against federal prison officials in State courts. Such suits generally turn upon the "official immunity" defense, which is solely a matter of federal law (*e.g., Howard* v. *Lyons,* 360 U.S. 593, 597), or may entail the construction and application of statutes and regulations of the federal government relating to the management of federal penal institutions. Thus, the particular State in which the federal prison is located is unlikely to have any significant interest in the maintenance or outcome of tort suits by prisoners brought against the prison officials. See, *e.g., Horne* v. *Aderhold,* 1 F. Supp. 690 (N.D. Ga.); *Jones* v. *McGill,* 46 F. 2d 334 (D. N.H.). Moreover, the potential for harassment of federal prison officials by embittered or simply litigious prisoners is considerable.[16]

[16] It should be noted that the district court correctly indicated that this Court's decision in *United States* v. *Muniz*, 374 U.S. 150, is inapposite here, since all the Court held was that an action under the Federal Tort Claims Act for injuries allegedly incurred while confined in a federal prison was maintainable (A. 43, 54). Nor are this Court's decisions in *Pierson* v. *Ray*, 386 U.S. 547, and *Dombrowski* v. *Eastland*, 387 U.S. 82, relevant here, since neither involved a removal question. And in *Wheeldin* v. *Wheeler*, 373 U.S. 647, not only was no removal issue involved, but the government conceded that the immunity doctrine was inapplicable (*id.* at 650–651).

Finally, there is no need here for any further proceedings on the issue of removability. The only inquiry necessary has been satisfied; it is beyond dispute that petitioners' "acts or [their] presence at the place [in question] in performance of [their] official duty constitute the basis, though mistaken or false" of respondent's action. *Maryland* v. *Soper,* 270 U.S. 9, 33. Moreover, the charges here made are of misuse of power "possessed by virtue of [federal] law and made possible only because the wrongdoer is clothed with the authority of" federal law. Cf. *United States* v. *Classic,* 313 U.S. 299, 326. The officer, of course, is not required, in order to remove, to admit that the acts alleged actually took place. *Maryland* v. *Soper,* 270 U.S. at 33.[17]

It is our view that the district court was correct here not only in upholding removal but also in dismissing the suit against petitioners under *Barr* v. *Matteo.* However, since the court of appeals did not

[17] In opposing the petition for a writ of certiorari, respondent stated that "petitioner Willingham failed or refused to answer interrogatories which dealt specifically with whether or not he was warden or acting as warden at the time the torts were committed" (Resp., p. 5). But respondent failed to make this argument in the district court. The full reference to the substance of interrogatories made in respondent's motion to remand is quoted at note 3 *supra* (see A. 30–32), and its relates only to Willingham's failure to identify the "Doe" and "Roe" defendants. At all events, this objection to removal in no way relates to Jarvis's right to remove. And since Jarvis was entitled to remove, the entire case, against *all* defendants, was properly removable to federal district court. *City of Gainesville* v. *Brown-Crummer Co.*, 277 U.S. 54, 60; *Barney* v. *Latham*, 103 U.S. 205, 211–213; *Murphy* v. *Kodz*, 351 F. 2d 163, 166–167; *Allman* v. *Hanley*, 302 F. 2d 559, 562 (C.A. 5). This, as well, was recognized by the district court here (see A. 43–44).

reach the issue whether the suit was properly dismissed under the "official immunity" doctrine, there is no necessity here for exploring the limits of *Barr* v. *Matteo*. Whatever the precise scope of the immunity doctrine, the "color of office" test for removal is necessarily broader, and is at all events sufficiently broad to support removal here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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